STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE RASHO,

Defendant-Appellant.

UNPUBLISHED
May 25, 1999

No. 206442
Kalkaska Circuit Court
LC No. 96-001627 FH

Before: Gage, P.J., and White and Markey, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of operating a motor vehicle under the influence of intoxicating liquor (OUIL) third offense, MCL 257.625; MSA 9.2325, resisting and obstructing a police officer in the discharge of his duty, MCL 750.479; MSA 28.747, and assault and battery, MCL 750.81; MSA 28.276. The trial court sentenced defendant to serve forty to ninety months on the OUIL third offense conviction, twelve months for the resisting and obstructing conviction, and ninety days for the assault and battery conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the district court improperly failed to abide by defendant's plea agreement. Prior to trial, defendant entered into a plea agreement that provided for a certain sentence disposition. The district court accepted defendant's plea, and agreed on the record to be bound by the sentence disposition. At defendant's sentencing hearing, however, the district court rejected the sentence disposition after having reviewed defendant's presentence report. Defendant subsequently withdrew his plea, and the case proceeded to trial.

The court rule governing guilty pleas, MCR 6.302, provides in relevant part as follows:

> (3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may
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> (a) reject the agreement; or

(b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the sentence agreed to or recommended by the prosecutor; or

(c) accept the agreement without having considered the presentence report; or

(d) take the plea agreement under advisement.

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow the sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to follow it, the defendant will be allowed to withdraw from the plea agreement. [MCR 6.302(C)(3) (emphasis added).]

In this case, the district court accepted defendant's plea without having reviewed defendant's presentence report, but did not explain to defendant that it was not bound to follow the sentence agreement or that if it chose not to follow the agreement defendant would have an opportunity to withdraw his plea. Accordingly, the district court failed to comply with MCR 6.302(C)(3).

Defendant argues that the district court's statement that it would be bound by the sentence agreement prejudiced him because he then made incriminating factual statements in support of the plea. During defendant's subsequent trial, however, no mention was made of defendant's prior guilty plea or of any of the incriminating statements defendant made to the district court. Furthermore, defendant's trial and sentencing occurred before a different court and judge. Therefore, the district court's error in failing to inform defendant of the court's authority to reject a sentencing agreement after review of the presentence materials did not prejudice defendant. Because defendant withdrew his plea and proceeded to trial, he was not denied any right or remedy. We therefore conclude that the district court's error was harmless. MCL 769.26; MSA 28.1096.

Defendant next argues that statements he made to officers at the accident scene and the videotape of those statements should have been suppressed because he had effectively been placed in custody when an officer told him not to leave the scene of the accident, and had not been given *Miranda*[1] warnings. An officer's obligation to give *Miranda* warnings to a person attaches only when the person is in custody, meaning that the person has been formally arrested or subjected to a restraint on freedom of movement of the degree associated with a formal arrest. *People v Peerenboom*, 224 Mich App 195, 197; 568 NW2d 153 (1997). The key question is whether the accused could reasonably believe that he was not free to leave. *People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998). The question whether a person is in custody, and thus entitled to *Miranda* warnings before being interrogated by the police, *People v Hill*, 429 Mich 382, 384, 397-399; 415 NW2d 193 (1987); *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995), is a mixed question of law and fact that we review de novo. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997).

The first officer arrived at the scene of defendant's accident in an unmarked car, wearing casual clothing, with no visible sign of a gun or a badge. Although two ambulance personnel were also at the scene, he was the only officer present at that time. Before the investigating officer arrived, the first officer was at the accident scene for only four minutes, and he testified that his primary concern on arriving at the scene was to care for any injured persons. The first officer testified that at one point defendant announced he was leaving, and that he advised defendant he needed to wait. Defendant then began to move away from the scene until one of the ambulance personnel advised defendant that he had some more questions for him and asked defendant to have a seat next to the roadway, which defendant did. There is no evidence, nor does defendant claim, that the officer threatened him in any way by making any physical gestures toward or contact with defendant. Defendant was not placed in the unmarked car or ambulance, but was allowed to move about freely. The first responding officer never questioned defendant regarding the circumstances that lead up to the accident. This whole incident took place along the roadside where the accident occurred, far from the confines of a police station or other coercive environment. The second, investigating officer then arrived in a marked patrol car with mounted videotaping equipment. He questioned defendant regarding the manner in which the accident had occurred, at which time defendant volunteered that he had been drinking. The officer then administered several field sobriety tests, which defendant failed. Defendant was then placed under arrest. These facts give no indication that defendant reasonably believed he was not free to leave. Based on the totality of these circumstances, we conclude that defendant was not placed in custody for *Miranda* purposes by the first officer's conduct. *Marsack*, *supra*. Furthermore, regarding the second officer's subsequent questioning and administration of field sobriety tests, we find that this constituted proper roadside questioning and not a custodial interrogation. *People v Jelneck*, 148 Mich App 456, 460; 384 NW2d 801 (1986); *People v Chinn*, 141 Mich App 92, 96-97; 366 NW2d 83 (1985). Therefore, the trial court properly admitted defendant's statements and the videotape containing defendant's statements.

Affirmed.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jane E. Markey

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).